Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1991
No. 91-904

CONCRETE PIPE AND PRODUCTS OF CALIFORNIA, INC.,

Petitioner,

vs.

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW AND SUMMARY OF ARGUMENT

1. Since MEPPAA expressly provides that "Any dispute between an employer and the plan sponsor concerning a determination [of withdrawal liability] shall be resolved through arbitration," the District Court was correct in requiring the parties to submit the issue of the date of complete withdrawal to arbitration because of the need to resolve conflicting factual inferences, regardless of whether that date was determined to be before or after the effective date of MEPPAA.

2. Since the section 1401 presumptions in favor of the Trust only allocate the burden of proof on the employer to show that the Trust's determinations are unreasonable, and do not deprive the employer of its right to fully challenge those determinations both before an impartial arbitrator and the Court, the presumptions comply fully with procedural due process requirements, including the providing of an impartial decision-maker.

3. Since there is substantial evidence to support the arbitrator's conclusion that Concrete Pipe permanently withdrew from the Trust in December 1981 when it terminated its collective bargaining agreement, and not when it temporarily idled its plant in August 1979, the District Court correctly confirmed the arbitrator's finding under §1383 that Concrete Pipe withdrew *after* the September 1980 effective date of MEPPAA, and that Concrete Pipe is therefore liable for withdrawal liability.

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   b. Any Subjective "Intent" Of Concrete Pipe To Make Its Temporary Idling Of The Plant In August Of 1979 "Permanent" Is Irrelevant. Permanence Is Determined By The Objective Facts, And Concrete Pipe's Going Back Into Full Production In November And December Of 1981 Made The Idling Of The Plant In August

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c. Even If Concrete Pipe's Intent Was Relevant In Determining Whether There Was A Permanent Cessation Of Covered Operations, The Evidence Showed That Concrete Pipe Intended That The 1979 Idling Of The Shafter Plant Be Temporary.

4. MEPPAA constitutionally modified contract rights in an area already subject to extensive prior economic regulation, and therefore, there was no violation of substantive due process or of the taking clause.

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I. INTRODUCTION

By the present Petition for Writ of Certiorari, Petitioner Concrete Pipe and Products of California, Inc., ("Concrete Pipe") seeks to reverse the Ninth Circuit's affirmance of the District Court's confirmation of an American Arbitration Association award issued in favor of Respondent The Construction Laborers Pension Trust for Southern California ("Trust") against Concrete Pipe in the amount of $190,465.57 plus interest. In addition, the District Court awarded attorneys' fees in favor of the Trust.

The proceedings below arose out of attempts by the Trust to collect "withdrawal liability" from Concrete Pipe. Withdrawal liability arises under the Multi-Employer Pension Plan Amendments Act of 1980 ("MEPPAA"), 29 U.S.C. §§1381-1405, which provides that an employer withdrawing from a multi-employer pension plan after September 26, 1980, must pay to the plan the employer's its proportionate share of the pension plan's unfunded vested liability to the plan's beneficiaries.

II. STATEMENT OF THE CASE

A. Summary Of Procedural History

On October 5, 1982, the Trust filed an action against Concrete Pipe in the United States District Court for the Central District of California, case 82-5184-MML, seeking collection of withdrawal liability due under MEPPAA. (White CR-1. The preceding reference to the record and those that follow are to the Appendix filed before the Ninth Circuit.)

On October 6, 1982, Concrete Pipe filed its own action against the Trust in the United States District Court for the Eastern District of California, case 82-389-EDP. In its complaint, Concrete Pipe sought declaratory and injunctive relief against the collection of withdrawal liability by the Trust, asserting that Concrete Pipe had withdrawn from the Trust prior to the effective date of MEPPAA and also that MEPPAA was unconstitutional on numerous grounds.

Pursuant to stipulation, the Eastern District action was transferred to the Central District and assigned case 83-132-WMB. The actions were then consolidated.

After conducting discovery, the parties filed extensive stipula-

tions of fact and simultaneously filed cross-motions for summary judgment on the issues of (1) the date of Concrete Pipe's withdrawal and (2) the constitutionality of MEPPAA. The cross-motions for summary judgment were heard before Judge Malcolm M. Lucas on March 19, 1984.

On April 4, 1984, Judge Lucas rendered his opinion and order upholding the constitutionality of the mandatory arbitration provisions of MEPPAA and ordering that the parties submit their dispute to arbitration to resolve all remaining issues of fact, including specifically the date that Concrete Pipe withdrew from the pension plan. As stated by Judge Lucas, the factual question for resolution by the arbitrator was:

> "Did Concrete Pipe permanently close its Shafter plant in 1979, as Concrete Pipe maintains, or did it, as the Pension Trust argues, simply 'mothball' the facility pending its relocation elsewhere in the Union's jurisdiction or pending an increase in business such as apparently occurred in 1981?"

(Order Compelling Parties to Submit to Arbitration, White CR-68, p. 5.)

The Court then went on to reserve judgment on the remaining constitutional issues briefed in the summary judgment motions, pending their possible renewal after arbitration. Finally, the Court expressly retained jurisdiction to enforce its order to arbitrate. (*Id.* at 9.)

Concrete Pipe then appealed the District Court's arbitration order to the Ninth Circuit. The appeal was dismissed by the Ninth Circuit in November of 1985 with the Court holding that it did not have jurisdiction over Concrete Pipe's interlocutory appeal. The Ninth Circuit then remanded the case to the District Court. *Construction Laborers Pension Trust v. Cen-Vi-Ro*, 776 F.2d 1416 (9th Cir. 1985).

Pursuant to the District Court's order, the arbitration then commenced before the American Arbitration Association. At the request of Concrete Pipe, the arbitrator bifurcated the arbitration, with the first session to determine liability and the second session to determine the amount of withdrawal liability.

During the first arbitration session on liability, Concrete Pipe contended that it withdrew from the Trust prior to the effective date of MEPPAA by temporarily idling its plant, thereby avoiding

the imposition of "withdrawal liability.' At the first hearing, the arbitrator decided against Concrete Pipe, finding that its pre-enactment idling of the plant was not a "permanent cessation of covered operations" sufficient to constitute a "complete withdrawal." Instead, the arbitrator held that Concrete Pipe's termination of its collective bargaining agreement after the effective date of MEPPAA was the 'complete withdrawal' from the Trust, thereby triggering "withdrawal liability.' More specifically, the arbitrator held as follows:

> "Concrete Pipe and Products Company of California did not permanently close its Shafter, California plant in August 1979, but simply 'mothballed' the facility pending an increase in business, which increase in business resulted in the reopening of the plant for production on November 1, 1981."
>
> "Accordingly, the Concrete Pipe and Products Company of California is liable under MEPPAA for withdrawal liability."

(Decision of Arbitrator, August 26, 1987, Blue CR-1, Ex. A, pp. 13-14.)

During the second arbitration session on the amount of withdrawal liability, Concrete Pipe contended that the actuarial assumptions and methods used by the Trust in calculating the amount of withdrawal liability were unreasonable. At the second hearing, the arbitrator found that Concrete Pipe "failed to show by a preponderance of the evidence that, in the aggregate, the actuarial assumptions and methods used by the Trust in the determination of Concrete Pipe and Products Company of California['s liability] were unreasonable." The arbitrator then held Concrete Pipe liable for $190,465.57 in withdrawal liability, plus accrued interest. (Decision and Award of Arbitrator, August 16, 1988, Blue CR-1, Ex. B, p. 27.)

On September 26, 1988, Concrete Pipe filed a complaint with the District Court seeking to vacate or modify the arbitrator's award. (Blue CR-1.) The Trust then filed an answer and counterclaim seeking to confirm the arbitrator's award. (Blue CR-7.)

The Trust and Concrete Pipe then filed cross-motions, the Trust's to confirm the award and Concrete Pipe's to vacate the award.

On July 6, 1989, Judge Hupp entered his "Order re Cross Motions to Vacate/Modify/Confirm Arbitration Award." (White

CR- 127.) In his thorough and carefully reasoned decision, Judge Hupp upheld (1) the constitutionality of MEPPAA (*Id.* at 2-3.), (2) the arbitrator's decision on liability based on "complete withdrawal" after the effective date of MEPPAA (*Id.* at 3-7.), and (3) the arbitrator's decision on the amount of withdrawal liability (*Id.* at 7-10). Additionally, Judge Hupp awarded the Trust its costs of suit and attorneys' fees for all court work. (*Id.* at 10.)

First, in upholding the constitutionality of MEPPAA, Judge Hupp found that the Ninth Circuit's case of *Board of Trustees v. Thompson Building Materials*, 749 F.2d 1396 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985), was controlling. In *Thompson*, the Ninth Circuit upheld the constitutionality of many of the provisions of MEPPAA attacked by Concrete Pipe, and the District Court expressly found that the facts of *Thompson* were not distinguishable from the present case.

Second, in upholding the arbitrator's decision on liability, Judge Hupp found substantial evidence to support the arbitrator's conclusion that the temporary idling of the plant before the enactment of MEPPAA was not a "permanent cessation of covered operations" such as would have triggered a "complete withdrawal" that would have avoided liability for withdrawal:

> "Here the evidence is consistent with the conclusion drawn by the arbitrator that CPP did not intend to permanently cease operations at the Shafter plant, but that CPP merely closed what was apparently at the time an uneconomical operation. When the plant again became economical, it was reopened for a period, thus demonstrating that the closing was conditional. As powerfully set out by the arbitrator, CPP's retention of the site, the sending of salesmen into the area, and the negotiation and conclusion of a contract for which the plant was later reopened, all negate an intent to abandon permanently the covered operations at the Shafter plant. Thus, the arbitrator had sufficient basis to conclude that the date of cessation of the obligation to pay benefits (which was after the effective date of MPPAA) was the date of complete withdrawal."

(*Id.* at 5-6.)

Third, and finally, Judge Hupp found substantial evidence to

support the arbitrator's conclusion that the actuarial assumptions and methods used by the Trust were reasonable:

> "The plan's actuary had the significant fortifying feature of being the most widely recognized in the field, with massive experience nationwide in advising pension trustees. CPP attacked the assumptions with an actuary of vastly less experience (in fact no experience with multi-employer trusts). While the use of any economic prediction factor can be debatable, the Court cannot say, or come close to saying, that the conclusions of the arbitrator are against the clear preponderance of evidence. The Court accepts the reasoning of the arbitrator in this respect and adopts his findings."

(*Id.* at 9.)

On August 4, 1989, Concrete Pipe filed its notice of appeal of the rulings of Judges Lucas and Hupp thereby commencing the appeal before the Ninth Circuit. (White CR-128.)

The Ninth Circuit subsequently affirmed the District Court's decision and denied Concrete Pipe's request for a rehearing *en banc*.

Concrete Pipe then filed the present Petition for Writ of Certiorari.

B. Summary Of The Facts Relevant To The Determination Of "Withdrawal Liability"

The facts presented at the first hearing on "liability,' as stipulated to, in part, by the parties, and as subsequently found and affirmed by the District Court, the Court of Appeals, the arbitrator, and again the District Court and Court of Appeals are summarized below, supplemented by references to the Depositions of Messrs. Navas and Street, who were executive officers of Concrete Pipe at the relevant times. (The Depositions of Navas and Street were admitted into evidence at the arbitration hearing, admitted respectively as Fund Exhibit 2 and Joint Exhibit 4. The Stipulated Facts were admitted into evidence at the first arbitration hearing as Joint Exhibit 2.)

On November 30, 1976, Concrete Pipe purchased a plant for the manufacture of concrete pipe located in Shafter, California, from Cen-Vi-Ro Concrete Pipe & Products Company. Upon

purchase, Concrete Pipe honored the terms of the collective bargaining agreement between the former owner and the Southern California District Council of Laborers. This agreement required that the owner of the plant make contributions to the Trust's pension plan for each hour worked by covered employees. (Stipulated Facts, White CR-49, ¶¶7-9.)

On November 27, 1978, Concrete Pipe itself signed a new collective bargaining agreement with the Southern California District Council of Laborers, which likewise required contributions to the Trust for each hour worked by employees of the Shafter Plant. This new agreement provided for automatic renewal, unless the parties gave notice of a desire to renegotiate its terms prior to June 30, 1981, or prior to June 30 of each yew thereafter. (*Id.*, ¶9.)

Up until August 1979, the Shafter Plant was in full and continuous production of concrete pipe. However, from August 1979 to November 1981, Concrete Pipe temporarily suspended production at the plant. (*Id.*, ¶¶15-16.)

Concrete Pipe made its last contributions to the Trust in May of 1980. (*Id.*, ¶¶18-20.) However, during the entire period that the plant was idled from August of 1979 through November of 1981, Concrete Pipe maintained full-time employees at the Shafter Plant as caretakers who maintained the premises, worked in the pipe storage yard, and loaded and handled pipe. (*Id.*)

Throughout the period of August 1979 through November 1981, Concrete Pipe continued to diligently search for additional work in the Shafter-Bakersfield area by sending salesmen into the area on a regular basis. (Navas' Depo., Fund Exhibit 2, pp. 74-77; Street Depo. pp., Joint Exhibit 4, 35-37, 54-55, 59-62.)

In the fall of 1981 these efforts paid-off and Concrete Pipe was the successful bidder on a project known as Wheeler Ridge in the Bakersfield area. It was awarded two of the four contracts it bid on for the project, for a total of approximately 7,000 tons of concrete pipe. The plant was then reopened and put back into full production in November 1981, and the Shafter plant then employed persons within the classification of laborers covered by the scope of the 1978 to 1981 collective bargaining agreement between Concrete Pipe and the Laborers' Union. (Stipulated Facts, White CR-49, ¶¶15, 21.)

The plant stayed in full production into 1982, producing approximately 7,000 tons of concrete pipe. The plant was then

shut down again in 1982. As testified to by Stanley Navas, President of Concrete Pipe, "[We s]hut the plant down in August of 1979. We reactivated it temporarily in November, 1981. Deactivated it *permanently* in November or December, *1982*. 1 believe that date is November, the record will show that." (Navas Deposition, pp. 11, 13-23. Emphasis added. See also pp. 48-50.)

While Concrete Pipe was looking for work in the Bakersfield area, in April and May of 1981, both the Laborers' Union and Concrete Pipe gave each other notice that they desired to renegotiate the collective bargaining agreement for the Shafter Plant. (Stipulated Facts, CR-49, ¶¶11-12.)

During October and November of 1981, Concrete Pipe and the Laborers Union, together with various other unions, negotiated towards a new agreement. (*Id.*, ¶13.) During November of 1981, while union contract negotiations were ongoing, the Shafter plant resumed full production and hired employees within the categories covered by the Laborers Union's collective bargaining agreement and for whom Concrete Pipe would be required to make contributions to the Trust. (*Id.*, ¶¶15 and 21.)

At the end of November, specifically on November 30, 1981, Concrete Pipe gave notice that an impasse in negotiations had been reached and "withdrew recognition" of the unions, including the Laborers Union, thereby giving notice of the termination of the collective bargaining agreement, which under its terms was terminable on 15 days written notice. (*Id.*, ¶13, Ex. C.) Therefore, the effective termination date of the collective bargaining agreement was December 15, 1981.

The Trust contends in this arbitration that Concrete Pipe's termination of the collective bargaining agreement, effective December 15, 1981, caused the permanent cessation of Concrete Pipe's "obligation to contribute' to the Trust's pension plan, and therefore constituted a "complete withdrawal," subjecting Concrete Pipe to withdrawal liability under MEPPAA, and requiring it to pay its share of the unfunded vested liability of the plan for employee retirement benefits.

Based on that termination of the collective bargaining agreement, on January 20, 1982, the Trust sent Concrete Pipe notice that it was liable for withdrawal liability for its share of the pension plan's unfunded vested benefits. (*Id.*, ¶22, Ex. D.)

Concrete Pipe then refused, and continues to refuse, to pay any part of its withdrawal liability, contending that MEPPAA is

unconstitutional and also that it effected a complete withdrawal from the plan prior to the September 26, 1980, effective date of MEPPAA when it temporarily idled its plant in August 1979.

The facts as found by the arbitrator are set out on pages 3 through 6 of his August 1987 decision on the first arbitration session. (Decision of Arbitrator, Blue CR-1, Ex. A.) As the key factual determination, the arbitrator found that "Concrete Pipe did not permanently close its Shafter plant in 1979 but simply 'mothballed' the facility pending an increase in business as a result of which it reopened its plant and hired employees in classifications covered by the Labor Agreement." Accordingly, the arbitrator found Concrete Pipe liable under MEPPAA for withdrawal liability.

III. ARGUMENT

A. Since MEPPAA Expressly Provides That "Any Dispute Between An Employer And The Plan Sponsor Concerning A Determination [Of Withdrawal Liability] Shall Be Resolved Through Arbitration." The District Court Was Correct In Requiring The Parties To Submit The Issue Of The Date Of Complete Withdrawal To Arbitration Because Of The Need To Resolve Conflicting Factual Inferences, Regardless Of Whether That Date Was Before Or After The Effective Date Of MEPPAA.

In March of 1984, both parties initially sought to have Judge Lucas decide the issue of when Concrete Pipe withdrew from the Trust. The parties filed extensive stipulations of undisputed facts. However, Judge Lucas[1] properly noted that even though the underlying facts were not in dispute between the parties, those facts raised sharply conflicting inferences that were the very heart of the dispute between them. As stated by the District Court:

> "In specific terms, the factual question is this: Did Concrete Pipe permanently close its Shafter plant in 1979, as Concrete Pipe maintains, or did it, as the Pension Trust argues, simply 'mothball' the facility pending its relocation elsewhere in the Union's jurisdiction or pending an increase in business such as apparently occurred in 1981?"

Because of these conflicting inferences, the Court held that the arbitrator in the first instance had to determine the fact of when withdrawal took place. (Order Compelling Parties to Submit to Arbitration, White CR-68, p. 5.)

Concrete Pipe contends that Judge Lucas erred in requiring it to arbitrate the issue of the date it withdrew from the Trust.

However, MEPPAA expressly provides that "Any dispute between an employer and the plan sponsor concerning a determination made under section 1381 through 1399 of this title shall be resolved through arbitration." 29 U.S.C. §1401(a)(1) (emphasis added). Section 1381 through 1399 establish withdrawal liability and provide the methods of determining and collecting it.

Judge Lucas correctly held that it did not make any difference if Concrete Pipe was contending that the date of withdrawal was prior to the enactment of MEPPAA. If there is a dispute regarding the date of withdrawal, whether before or after the effective date of the act, that dispute must be arbitrated. As explained by another District Court upon which Judge Lucas relied:

> "Schulze [the employer] argues that if it had no obligation to contribute to the Plan after the effective date of the Act, then the Act's arbitration procedures do not apply. . . . The Plan trustees have determined that Schulze withdrew from the Plan on December 12, 1980. Schulze disagrees. This is 'a dispute . . . concerning a determination made under sections 1381 through 1399 . . .' 29 U.S.C. §1401(a)(1). If a dispute between an employer and a plan sponsor were to arise over whether withdrawal occurred in December 1980, or January 1981, the dispute would clearly be subject to the arbitration procedures of the Act. This result should not change because the employer happens to be arguing for a date preceding the effective date of the Act."

I.A.M. Nat'l Pension Fund v. Schulze Tool & Dye Co., 564 F. Supp. 1285, 1289-90 (N.D. Cal. 1983).

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[1] Judge Malcolm M. Lucas is now the Chief Justice of the California Supreme Court.

Since Judge Lucas's ruling in 1984, the Ninth Circuit has ruled on this issue in *Teamsters Pension Trust Fund Board of Trustees v. Allyn Transportation Co.*, 832 F.2d 502 (9th Cir. 1987). In the *Allyn* decision, the Ninth Circuit panel was faced with the same question presented here. As stated by the Court:

> "Allyn's contention in the district court and in this Court is that whether a 'complete withdrawal,' within the meaning of 29 U. S. C. §1383, occurred before the effective date of MPPAA, is a question for the Court, not an arbitrator, to decide: (1) because the question is one of statutory construction-a pure question of law; and (2) because the question is whether Allyn was subject to MPPAA at the critical time and therefore under any duty to arbitrate at all."

Id. at 504.

The *Allyn* Court then expressly rejected the employer's contention that whether it withdrew before the effective date of MEPPAA must be decided by a Court before arbitration is initiated. *Id.* at 505. As the Court stated:

> "[T]he statute states unambiguously that '[a]ny dispute between an employer and the plan sponsor . . . concerning a determination made under sections 1381 through 1399 . . . shall be resolved through arbitration' (29 U.S. C. ¶1401 (a)(1)), and Congress clearly intended exactly what those words import."

Id. at 505-06 (emphasis in original). *Accord, I.A.M. Nat'l Pension Fund v. Clinton Engines Corp.*, 825 F.2d 415, 422 (D.C.Cir. 1987) (whether withdrawal preceded effective date of MEPPAA should have been arbitrated); *Warner-Lambert Co., Inc. v. United Retail & Wholesale Employee's Teamsters Local No. 115 Pension Plan*, 791 F.2d 283, 287-88 (3d Cir. 1986) (upholding referral to arbitration of dispute over whether the employer had withdrawn before the effective date of MEPPAA); *Woodward Sand Co. v. Western Conference Of Teamster Pension Trust Fund*, 789 F.2d 691, 695-96 (9th Cir. 1986) (criticizing lower court for not presuming correctness of arbitral finding that employer had not withdrawn until after MEPPAA's effective date).

Just as in the *Schulze* and *Allyn* cases, the dispute in the present case of when withdrawal occurred must also be arbitrated

pursuant to section 1401(a)(1), despite Concrete Pipe's contention that the withdrawal date was prior to the effective date of the act. On the one hand, Concrete Pipe contends it withdrew from the plan in August 1979, prior to the effective date of September 26, 1980. On the other hand, the Trust contends that the withdrawal instead occurred in December 1981, long after the effective date of MEPPAA. Therefore, the above reasoning of *Schulze* and *Allyn* is applicable here, and the initial determination of the withdrawal date was correctly made in the mandatory arbitration proceeding provided for in the enforcement scheme of MEPPAA.

Next, once it is decided that the dispute as to the withdrawal date falls under the arbitration requirement of MEPPAA, it is then necessary to look more closely at the nature of the exhaustion requirement imposed. As noted in *I.A.M. Nat'l Pension Fund Benefit Plan C v. Stockton Tri-Industries*, 727 F.2d 1204 (D.C.Cir. 1984), two different exhaustion of remedies requirements exist under federal law. First, there are those that are "statutorily specified jurisdictional prerequisites," and second, there are those that are judicially imposed and basically reflect prudential concerns. *Id.* at 1208.

The *Tri-Industries* Court, and others that have addressed the issue, have uniformly held that the arbitration requirement under MEPPAA falls under the second of these categories, requiring exhaustion of the arbitration remedy as a prudential matter. *Id.* at 1208; *Schulze*, 564 F.Supp. at 1293.

The Courts go on to hold that unless there is an applicable exception to the 'prudential" exhaustion requirement, arbitration should always be required. As stated by one Court in reviewing the arbitration requirements of MEPPAA:

> "If the statutory schema mandates exhaustion of an administrative remedy, and if that remedy is adequate in its furtherance of the policies behind the doctrine, then only in extraordinary circumstances, when the complaining party satisfies one of the narrow exceptions to the doctrine, should the Court excuse exhaustion."

Republic Indust. v. Central Penn. Teamsters Pension Fund, 693 F.2d 290, 294 (3d Cir. 1982).

As stated by another Court in deciding whether to compel arbitration under MEPPAA, the basic exceptions to the exhaustion doctrine are (1) where irreparable injury will result prior to Court

review, (2) where only issues of statutory interpretation are involved, (3) where antitrust claims are involved, and (4) where issues of constitutional dimension are involved. *T.I.M.E.-D.C., Inc. v. Trucking Employees of North Jersey Welfare Fund*, 560 F.Supp. 294, 302 (E.D.N.Y. 1983).

In the present case, Concrete Pipe contends that the District Court should have determined the date of withdrawal itself, and then only if it found that the withdrawal date was after the effective date of MEPPAA should the matter have then been sent to arbitration. Reviewing the above list of the four exceptions to the exhaustion doctrine, the only one which appears to have any possible application in the present case to determining the withdrawal date is the second one of statutory interpretation.

Where the issue is indeed "*purely* one of statutory interpretation," exhaustion need not be required by a Court. *Tri-Industries*, 727 F.2d at 1210. However, such a situation exists only where there is no factual dispute of any kind between the parties, and the issue is therefore one of law hinging solely on the interpretation of a statute. Such a situation existed in the *Tri-Industries* case, and the Court found exhaustion of the arbitration remedy unnecessary "[b]ecause there are neither questions of fact nor issues of contractual interpretation to resolve [and therefore] an arbitrator skilled in pension and labor matters would have no superior expertise to offer." *Id.* at 1210.

On the other hand, where, as in the present case, the facts (or mixed questions of law and fact) to which a statute needs to be applied are disputed, exhaustion of the arbitration remedy is required:

> "If, for example, a challenge were founded upon a particular question of law and fact, *e.g.*, whether a 'withdrawal' has occurred, or whether a party was an 'employer' within the meaning of the Act, prior adjudication by the arbitrator would be an appropriate prerequisite."

Dorn's Transportation, Inc. v. I.A.M. Pension Fund, 578 F.Supp. 1222, 1226 (D.C. 1984).

Similarly, in *Republic* the Court was faced with determining whether two terminals, one of which closed prior to the effective date of MEPPAA, were one "facility" under the act, thereby making both liable for withdrawal liability where the second terminal closed after the effective date. The Court held that this

was a mixed question of law and fact that under MEPPAA had to be decided by an arbitrator:

> "It seems to us that whether the two terminals represented Richmond facility or whether the surviving terminal became a covered facility after the five employees who were beneficiaries of a benefit plan were transferred to it is a nice question of fact and law. We have no doubt that the scheme of the 1980 Act is to require such a question to be decided by an arbitrator rather than a Court."

Republic, 718 F.2d at 635 (emphasis in original).

In the present case, Judge Lucas properly found that the conflicting factual inferences on whether the temporary suspension of operations at the plant in August 1979 was "permanent" within the meaning of MEPPAA was a mixed question of law and fact that required resolution in the first instance by the arbitrator as the trier of fact. The appropriate role for the District Court then became as a reviewer of the arbitrator's application of MEPPAA to the facts, with the important difference being the requirement of giving due deference to the arbitrator's findings of fact, just as was done by Judge Hupp when he was later asked to confirm or vacate the arbitrator's award.

Finally, the cases cited by Concrete Pipe on page 9 of its Petition for Writ of Certiorari do not provide authority to the contrary. It is correct that whether a dispute is subject to arbitration is an issue for judicial determination. However, that is exactly what happened here. The District Court did correctly make a judicial determination that the dispute was arbitrable.

Once it was determined by the District Court that this was indeed "a dispute . . . concerning a determination made under sections 1381 through 1399 . . ." (29 U.S.C. §1401(a)(1)), that is, a dispute regarding the collection of withdrawal liability, the Court necessarily also determined that the dispute was arbitrable. It is irrelevant, as pointed out by the above cases, whether the disputed withdrawal date was before or after the Act; the dispute is nevertheless one over withdrawal liability, which is subject to arbitration in the first instance, regardless of the actual date of withdrawal.

In conclusion, the District Court's decision to order the dispute regarding withdrawal liability to arbitration should be upheld and

the present Petition denied.

B. Since The Section 1401 Presumptions In Favor Of The Trust Only Allocate The Burden Of Proof On The Employer To Show That The Trust's Determinations Are Unreasonable, And Do Not Deprive The Employer Of Its Right To Fully Challenge Those Determinations Before An Impartial Arbitrator And The Court, The Presumptions Comply Fully With Procedural Due Process Requirements, Including Providing An Impartial Decision-Maker.

Concrete Pipe contends that the statutory presumptions contained in 29 U.S.C. section 1401(a)(3) that require the employer to shoulder the burden of proof in attacking a determination of withdrawal liability violate procedural due process.

However, the controlling case below for the Ninth Circuit of *Board of Trustees v. Thompson Building Materials, Inc.*, 749 F.2d 1396, 1403-04 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054, upholds the constitutionality of the section 1401 presumptions attacked by Concrete Pipe. All of the other circuits that have ruled on the issue, except one, are in accord with the Ninth Circuit. *Accord, Keith Fulton & Sons v. New England Teamsters*, 762 F.2d 1137, 1146 (1st Cir. 1985); *The Washington Star Co. v. International Typographical Union Pension Plan*, 729 F.2d 1502, 1511 (D.C.Cir. 1984); *Textile Workers Pension Fund v. Standard Dye & Finishing Co.*, 725 F.2d 843, 855 (2d Cir. 1984), *cert. denied*, 104 S.Ct. 3554; *Terson Co. v. Bakery Drivers & Salesmen* Local 194, 739 F.2d 118, 121 (3d Cir. 1984); *Republic Industries, Inc. v. Teamsters*, 718 F.2d 628, 640-41 (4th Cir. 1983), *cert. denied*, 104 S.Ct. 1553.

In his decision in the District Court, Judge Hupp found *Thompson* to be controlling and its facts indistinguishable from the present case. Based thereon, he rejected Concrete Pipe's constitutional attack on the 1401 presumptions. (Order re Cross Motions to Vacate/Modify/Confirm Arbitration Award, White CR-127 at 3.)

The sole aberrational case of *United Retail v. Yahn*, 787 F.2d 128 (3d Cir. 1986), has found the presumption unconstitutional. In that case, the Court failed to analyze the "presumption," as the other circuits correctly have, as simply putting the burden of proof

on the employer to show that the imposition of withdrawal liability is correct. *Yahn's* analysis would only make sense if the "presumption' was irrebuttable, which of course it is not.

As an ordinary rebuttable presumption affecting only the burden of proof, there is nothing constitutionally suspect. As the Court knows, evidence law is full of many such rebuttable presumptions. The employer simply has to meet the burden of proof on the issue, rather than the pension plan.

The leading United States Supreme Court case on the constitutionality of rebuttable presumptions in civil cases is *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed. 752 (1976). In *Usery*, noting the low scrutiny analysis applicable to civil economic legislation, the Supreme Court upheld as constitutional statutory presumptions placing the burden of proof on employers to show that long-term coal miners with black lung contracted the disease from causes outside their employment. *Id.* at 28-32.

Also on point is *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 446, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959). In *Dick*, the Supreme Court upheld against constitutional attack a state statutory presumption that shifted the burden of proof to an insurance company to prove that the death of an insured was due to suicide. *Id.* at 443-46.

The section 1401 presumption is simply and only a constitutional allocation of the burden of proof onto a withdrawing employer to show that the amount of withdrawal liability sought is unreasonable. As explained by the Court in the *Republic* case (the reasoning of which the Ninth Circuit expressly agreed with in *Thompson*, 749 F.2d at 1404):

> "In making factual determinations . . . as well as the amount of the employer's withdrawal liability, a decision of the trustees is subject to arbitration, and the decision of the arbitrator, to judicial review. We reject Republic's argument that such review is essentially meaningless. It is true that the MPPAA makes the trustees' decision presumptively correct, §1401(a)(3)(A), and provides that the decision of the arbitrator is also presumptively correct and may be rebutted only by a clear preponderance of the evidence, §1401(c). *Read together, however, these provisions do little more*

> *than allocate the burden of proof to the challenger* and direct that issues which are close be resolved in favor of the nonjudicial dispute resolver. *In this we perceive no evident unfairness*. We do not think, as Republic argues, that an employer cannot obtain effective judicial review of the arbitrator's legal rulings."

Republic, 718 F.2d at 641 (emphasis added).

Such an allocation of the burden of proof requiring a showing that the determination is unreasonable or clearly erroneous is no more unconstitutional than typical state law provisions requiring the proving of fraud by "clear and convincing" evidence. Similarly, the allocation of the burden onto the employer (rather than the Trust) is no more unconstitutional than requiring a defendant to prove "affirmative defenses" in common law cases.

Furthermore, the Courts of Appeals that have addressed the issue have expressly held that the trustees, half of whom are selected by unions and the other half of whom are selected by multi-employer associations, do not suffer from any institutional bias which constitutionally affects their initial determination of withdrawal liability. *Textile*, 725 F.2d at 855; *Republic*, 718 F.2d at 640.

In conclusion, Judge Hupp's and the Ninth Circuit's decision upholding the constitutionality of the allocation of the burden of proof on the employer under section 1401(a)(3) should be affirmed and the present Petition denied.

C. Since There Is Substantial Evidence To Support The Arbitrator's Conclusion That Concrete Pipe Withdrew From The Trust In December 1981 When It Terminated Its Collective Bargaining Agreement, And Not When It Temporarily Idled Its Plant In August 1979, The District Court Correctly Confirmed The Arbitrator's Finding That Concrete Pipe Withdrew After The September 1980 Effective Date Of MEPPAA.

The following four subsections address fully the reasoning process of the Courts and the arbitrator below in which they determined that Concrete Pipe withdrew from the Trust's plan after the effective date of MEPPAA.

In section D of its Petition, Concrete Pipe appears to attempt

to attack the finding of the date of withdrawal in a vacuum that leaves out virtually all of the exhaustive decision-making process accorded this issue below, characterizing the process, without support or explanation, as a "wait and presume approach." (Petition, pp. 14-16.)

1. By Terminating Its Collective Bargaining Agreement In 1981, Concrete Pipe Effected A Complete Withdrawal Pursuant To §1383(a)(1) Because It Then Permanently Ceased To Have An Obligation To Contribute To The Plan.

First, any factual findings made by the arbitrator are presumed correct. As stated by 29 U.S.C. §1401(c):

> "In any proceeding under subsection (b) of this section, there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct."

Of course, this standard of review is similar to the general appellate standard of review of any evidence originally presented to any lower tribunal. In other words, if there is evidence in the record to support the factual findings, the appellate inquiry as to the facts stops there. This "clearly erroneous" standard of review is well established as a part of appellate review law. *See* Wright and Miller, *Federal Practice and Procedure* ¶2585.

As noted by Wright and Miller, under the "clearly erroneous" test the reviewer does not weigh the evidence de novo. Instead the reviewer simply looks to see if the finding is supported by substantial evidence. The mere fact that on the same evidence someone else might reach a different result does not justify setting the original findings aside. A finding may be found to be clearly erroneous only if it is without adequate evidentiary support. Wright and Miller, *Federal Practice and Procedure*, ¶2585 at pp. 733-34. In the present case, the evidence before the arbitrator fully supports his factual finding that Concrete Pipe is liable for withdrawal liability.

More specifically, the Stipulated Facts show a "complete withdrawal' by Concrete Pipe, as that term is defined by MEPPAA under 29 U.S.C. §1383(a)(1), on December 15, 1981, when it terminated its collective bargaining agreement, over a year after

the September 26, 1980, enactment and effective date of MEPPAA. Pursuant to §1381(a), that complete withdrawal in December 1981 made Concrete Pipe liable to the Trust for the payment of withdrawal liability—its share of the unfunded vested liability of the Trust to the beneficiaries at the time of the withdrawal.

On the other hand, Concrete Pipe erroneously contends that it effected a complete withdrawal from the Trust's plan under 29 U.S.C. §1383(a)(2) when it *temporarily* suspended production of pipe at the Shafter Plant in August of 1979, prior to the September 26, 1980, effective date of MEPPAA. Concrete Pipe so contends despite the language of §1383 (a)(2) that requires that an employer must "*permanently* cease all covered operations under the plan" in order to accomplish a complete withdrawal.

The arbitrator found that Concrete Pipe's contention had no merit since the facts showed that Concrete Pipe went back into full production in November of 1981, negating any finding of a *permanent* cessation of operations prior to the effective date of the act. Therefore, withdrawal liability was triggered when Concrete Pipe's obligation to contribute ceased at the time it terminated its collective bargaining agreement with the Laborers Union, after the effective date of the act.

Turning now to a more detailed analysis of the statutory language, first, 29 U.S.C. §1381(a) provides that an employer becomes liable for "withdrawal liability" when the employer effects a "complete withdrawal" from a multi-employer plan.

Section 1383(a) then defines "complete withdrawal":

> "For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer—
>
> (1) "*Permanently* ceases to have an obligation to contribute under the plan, *or*
>
> (2) "*Permanently* ceases all covered operations under the plan."

(Emphasis added.)

Concrete Pipe's contention that it withdrew from the plan under §1383(a)(2) by temporarily suspending production in August 1979 flies in the face of the express words of the section quoted above that requires a *permanent* cessation of covered operations to constitute a complete withdrawal. Since the undisputed facts in this case show that the plant resumed full production in November

and December of 1981, there was simply no *permanent* cessation of covered operations prior thereto. Therefore no "complete withdrawal" under §1383(a)(2) occurred in August of 1979 when the plant was temporarily idled.

Consequently, Concrete Pipe had not yet withdrawn from the plan when it later terminated its collective bargaining agreement on December 15, 1981, which then became the date of "complete withdrawal," thereby triggering withdrawal liability under section 1383(b)(1).

Since the controlling event here is the termination of the collective bargaining agreement, the controlling provision of MEPPAA is instead §1383(a)(1), which provides that there is a complete withdrawal when there is a permanent cessation of an employer's "obligation to contribute" to a plan. "Obligation to contribute" is defined in 29 U.S.C. §1392(a) as an obligation "arising . . . under one or more collective bargaining (or related) agreements."

In the present case, Concrete Pipe's "obligation to contribute" to the Trust arose under Concrete Pipe's November 27, 1978, collective bargaining agreement with the Laborer's Union, which required contributions to the Trust. That collective bargaining agreement contained the following termination clause:

> "This Agreement shall remain in full force and effect until June 30, 1981, and then thereafter from year to year until either party hereto shall give notice in writing to the other party of a desire to change, modify, or terminate this Agreement. Such notice shall be given at least sixty (60) days prior to June 30, 1981, or June 30 of each year thereafter. If no agreement is reached by June 30, 1981, or June 30 or any year thereafter, the Employer or the Union may thereafter give written notice to the other than on a specified date not less than fifteen (15) days after the date of said notice, the Agreement shall be considered terminated."

(Stipulated Facts, White CR-49, 19.)

As noted in the Stipulated Facts, the signatory unions and Concrete Pipe all gave timely notice of their intent to renegotiate the collective bargaining agreement more than 60 days prior to June 30, 1981. (*Id.* at ¶¶11 and 12.)

Negotiations for a new contract were then held in October and November of 1981. (*Id.* at ¶13.)

Finally, on November 30, 1981, the attorney for Concrete Pipe wrote to the unions, stating: "At the current time, Concrete Pipe & Products has no basis in [sic] which to continue recognition of your unions as representative of its employees and must withdraw any such recognition." (*Id.* at ¶13, Ex. C.)

Therefore, Concrete Pipe's termination of the agreement was effective fifteen days after November 30, 1981, that is, on December 15, 1981. By that date the Shafter Plant was already back in full production and Concrete Pipe had already hired employees covered by the provisions of the plan, for whom it had an obligation to contribute to the Trust. (*Id.* at ¶¶15 and 21.)

Therefore, since the obligation of Concrete Pipe to contribute to the Trust ceased with the termination of the collective bargaining agreement, a complete withdrawal occurred on December 15, 1981, the date upon which Concrete Pipe "permanently cease[d] to have an obligation to contribute under the plan," which was over a year after the September 26, 1980, enactment and effective date of MEPPAA.

2. Any Subjective "Intent" Of Concrete Pipe To Make Its Temporary Idling Of The Plant In August Of 1979 "Permanent" Is Irrelevant. Permanence Is Determined By The Objective Facts, And Concrete Pipe's Going Back Into Full Production In November And December Of 1981 Made The Idling Of The Plant In August Of 1979 Only A Temporary Suspension Of Operations.

The arbitrator expressly found that Concrete Pipe did not intend to permanently close its Plant in August of 1979, but instead intended only to temporarily "mothball' it until more business could be found. (Decision of Arbitrator, August 26, 1987, Blue CR-1, Ex. A, p. 14.) As a factual finding, Arbitrator Schwartz's finding of intent is entitled to the deferential appellate standard of review and should therefore not be set aside unless clearly erroneous. (See page 3, 23 for a discussion of the applicable standard of review for factual findings.) Judge Hupp then confirmed the arbitrator's decision that the idling of the plant in 1979 was not permanent.

At the arbitration, in an attempt to get around the express

words of the statute requiring a permanent cessation of covered operations for a complete withdrawal, Concrete Pipe contended that at the time it idled its plant in August 1979, it 'intended' that the closure be permanent. Concrete Pipe's argument continued that since the idling of the plant in August of 1979 was intended to be permanent, it was permanent within the meaning of §1383(a)-(2), despite the later resumption of full production in November 1981.

As noted above, the arbitrator found that Concrete Pipe actually intended the idling to be temporary; however, even if the arbitrator had found that Concrete Pipe had intended a permanent closure in 1979, the result would be the same because the employer's subjective intent is irrelevant in determining whether a cessation of covered operations is permanent.

In *United Food & Commercial Workers Int'l Union-Industrial Fund v. G. Bartusch Packing"*, 546 F.Supp. 852 (D.Minn. 1982), the Court held that the intent of an employer as to the permanence of any cessation of covered operations is irrelevant in determining whether a complete withdrawal has actually taken place under MEPPAA. In that case, the employer had closed its plant prior to the effective date of MEPPAA, having laid off indefinitely all of its employees. Depressed market conditions and the lack of financing were the causes of the plant's closing. It was conceded that at the time of closing its plant, the employer *intended* that the closure be *temporary*. In fact, the company actively sought financing and solicited new business in an attempt to reopen the plant. However, despite the company's best efforts, the plant never reopened, none of the employees were hired back, and the closure therefore became permanent.

The pension plan there contended that a complete withdrawal had not occurred prior to the effective date of MEPPAA because the employer had intended that the closure of its plant be temporary at the time he initially ceased production, prior to the effective date of MEPPAA.

However, the Court disagreed and held that the employer's intent was irrelevant in determining whether there had been a *permanent* cessation of covered operations. *Id.* at 857-58. As stated by the Court:

> "It is true that defendant did not intend to permanently cease its covered operations when it closed its plant and laid off its employees in April of

> 1979. Neither MEPPAA nor its legislative history discusses whether intent is an element of complete withdrawal. But the purpose and policy of the act suggest that applying MEPPAA to an employer who ceased covered operations prior to the effective date of the act and never resumed them would be unwarranted even though that employer did not initially intend to permanently cease covered operations."

Id. at 857.

As further stated and summarized by the Court: "Regardless of its intention . . . the failure of the plant to ever reopen means that the initial closing was permanent." *Id.* at 856 n. 6.

In other words, permanent cessation is determined by the objective, real-world facts. If, as in *Bartusch*, a plant never reopens, the cessation of operations was permanent. On the other hand, if the plant reopens, as in the present case, the cessation of operations was *not* permanent. Intent is irrelevant. *Accord, I.A.M. National Pension Fund v. Stockton Tri-Industries*, 727 F.2d 1204, 1211 (D.C. Cir. 1984) ('The statutory definition of "complete withdrawal," in terms of cessation of an obligation, makes [the employer's] expression of *intent to withdraw* irrelevant to the determination of the date of actual withdrawal." (Emphasis in original.))

In conclusion, Concrete Pipe's contention that its alleged subjective intent to permanently close its plant in August 1979 somehow made a temporary suspension of production "permanent," even though in fact the plant went back into full production in 1981, has no merit. Under *Bartusch*, any such intent is irrelevant, if in fact it did exist. Since Concrete Pipe did in fact reopen its plant, the closure in 1979 was simply not permanent. Therefore, liability arose when it terminated its collective bargaining agreement in 1981, long after the September 1980 effective date of MEPPAA.

3. Even If Concrete Pipe's Intent Was Relevant In Determining Whether There Was A Permanent Cessation Of Covered Operations, The Evidence Showed That Concrete Pipe Intended That The 1979 Idling Of The Shafter Plant Be Temporary.

As noted above, the determination of the permanence of a cessation of operations under §1383(a)(2) does not rely upon the subjective intent of the employer. What counts is whether or not the cessation of covered operations was in fact permanent, or rather, as here, temporary.

However, even if Concrete Pipe's intent on whether the 1979 closure was going to be permanent was relevant, the evidence shows, as the arbitrator held and as Judge Hupp confirmed, that Concrete Pipe had every intent of making that closure temporary, in other words, that the idling of the plant in 1979 was not intended to be permanent.

As shown by Mr. Navas' deposition on pages 62-66 and 74-77 and Mr. Street's deposition on pages 35-37, 54-55, and 59-62, Concrete Pipe actively solicited business throughout Southern California in an attempt to reopen its plant after the temporary lull in production in August 1979. As part of these efforts, it sent salesmen into the Shafter-Bakersfield area to canvass for sales on a bi-weekly basis. Concrete Pipe then later looked for new locations for the plant in order to resume production, and also repeatedly renewed its lease for the premises upon which the Shafter Plant sits.

Of course, the strongest factual inference supporting a finding that Concrete Pipe intended that the August 1979 closure be temporary is that drawn from the plant actually being put back into full production as soon as Concrete Pipe was able to make a sale in the area, that is, in November and December of 1981 when it was awarded two out of four contracts it had bid on for the Wheeler Ridge project. Also, throughout the idle period, Concrete Pipe maintained full-time employees at the Shafter Plant as caretakers to maintain the premises, work in the pipe storage yard, and load and handle the pipe. (Stipulated Facts, White CR-49, ¶¶18 and 19.)

In conclusion, based upon the facts before him, the arbitrator found that a complete withdrawal did not take place pursuant to §1383(a)(2) when Concrete Pipe temporarily idled its plant in

August of 1979. He instead found that complete withdrawal took place pursuant to §1383(a)(1) when Concrete Pipe terminated its collective bargaining agreement in December of 1981, thereby permanently ceasing its obligation to contribute to the plan and becoming liable for withdrawal liability.

Therefore, the arbitrator's finding that Concrete Pipe did not intend to permanently close the Shafter Plant in 1979 is fully supported by the evidence and Judge Hupp's decision to confirm that award and the Ninth Circuit's affirmance should be upheld and the present petition should be denied.

D. MEPPAA Constitutionally Modified Contract Rights In An Area Already Subject To Extensive Prior Economic Regulation, And Therefore, There Was No Violation Of Substantive Due Process Or Of The Taking Clause.

Despite two United States Supreme Court opinions upholding MEPPAA against attack under the Due Process and Taking Clauses of the Fifth Amendment, Concrete Pipe continues to contend that the act is unconstitutional on those grounds.

First, in *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, 467 U.S. 717, 104 S. Ct. 2709, 81 L.Ed.2d 601 (1984), the Supreme Court held that the retroactive application of the withdrawal liability provisions of MEPPAA did not violate the Due Process Clause of the Fifth Amendment. *Id.* 467 U.S. at 734. Due to the nature of MEPPAA as economic legislation, the Court held that low scrutiny applied for substantive due process analysis. In other words, all that needed to be shown was that the legislation was 'justified by a rational legislative purpose." *Id.* 467 U.S. at 730.

In *Gray* the Supreme Court upheld MEPPAA's original provision of a 5-month retroactive period preceding enactment against substantive due process attack. The act has since been amended to remove the 5-month retroactive period, thereby making the act even less subject to due process attack.

Second, in *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 106 S. Ct. 1018, 89 L. Ed. 2d 166 (1986), the Supreme Court held that the imposition of withdrawal liability did not constitute compensable taking under the Taking Clause of the Fifth Amendment. *Id.* 475 U.S. at 224, 228. In *Connolly* the Supreme Court noted that the United States has taken nothing for

its own use under MEPPAA. Instead, it has only nullified a contractual provision limiting liability by imposing an additional obligation that is within Congress' power to impose. *Id.* 475 U.S. at 221-224.

The *Connolly* Court then went on to analyze three factors to be considered in determining whether there was a "taking" under the Taking Clause: (1) the character of the governmental action, (2) the economic impact of the regulation on the claimant, and (3) the extent to which the regulation has interfered with distinct investment-backed expectations. *Id.* 475 U.S. at 22527.

In applying the first factor on the character of the governmental action, the Court noted:

> "First, with respect to the nature of the governmental action, we already have noted that, under the Act, the Government does not physically invade or permanently appropriate any of the employer's assets for its own use. Instead, the Act safeguards the participants in multiemployer pension plans by requiring a withdrawing employer to fund its share of the plan obligations incurred during its association with the plan. This interference with the property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and, under our cases, does not constitute a taking requiring Government compensation."

Id. at 225.

On the second prong regarding the severity of the economic impact, the Court noted:

> "Next, as to the severity of the economic impact of the MPPAA, there is no doubt that the Act completely deprives an employer of whatever amount of money it is obligated to pay to fulfill its statutory liability. The assessment of withdrawal liability is not made in a vacuum, however, but directly depends on the relationship between the employer and the plan to which it had made contributions."

Id. at 225.

On the third factor of interference with expectations, the Court noted that pension plans have long been the subject of heavy

federal regulation and that the imposition of withdrawal liability did not upset reasonable expectations since various forms of withdrawal or plan termination legislation had been previously passed, and frequently considered. Citing *Gray*, the Court noted:

> "Prudent employers then had more than sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations."

Connolly, 475 U.S. at 228.

Quoting from an earlier Supreme Court decision, the Court then concluded:

> "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."

Id.

Finally, it is not correct for Concrete Pipe to contend that none of the Trust's unfunded vested liability is attributable to it. ERISA only requires a withdrawing employer to pay its proportionate share, based upon its own contributions to the plan as compared to the total contributions, of the unfunded vested liability at the time it withdraws. Such a connection, of course, easily satisfies the furtherance of a rational purpose required under a substantive due process analysis of economic legislation. Obviously, it would not be practicable to trace each employee of Concrete Pipe over the following decades to see which became vested at various times.

Instead, it was a reasonable alternative to make each withdrawing employer liable for its own proportionate share of the plan's total unfunded vested liability at the time it withdrew (and for which it would have been responsible had it remained in the plan).

In conclusion, the Supreme Court holdings in the *Gray* and *Connolly* cases are controlling here, and therefore, this Court should also uphold the constitutionality of MEPPAA under the Due Process and Taking Clauses.

E. If The Court Denies The Petition, It Should Include In Its Decision An Award Of Attorney's Fees And Costs As Mandated By MEPPAA.

Should the Trust prevail in opposing this petition, an award of attorneys' fees and costs incurred by the Trust is mandated by 29

U.S.C. section 1132(g)(2)(D).

Where, as here, the employer has refused to make withdrawal liability payments to the pension fund, section 1401(d) provides that the payments shall be collected as delinquent contributions under section 1145.

Section 1132(g)(2) then sets out what may be recovered by a plan in a delinquent contribution collection case. That subsection provides:

> "In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court *shall* award the plan—
>
> "(A) the unpaid contributions,
>
> "(B) interest on the unpaid contributions,
>
> "(C) an amount equal to the greater of-
>
> "(i) interest on the unpaid contributions, or
>
> "(ii) liquidated damages . . . .
>
> "(D) *reasonable attorney's fees and costs of the action, to be paid by the defendant*, and
>
> "(E) such other legal or equitable relief as the court deems appropriate.'

(Emphasis added.)

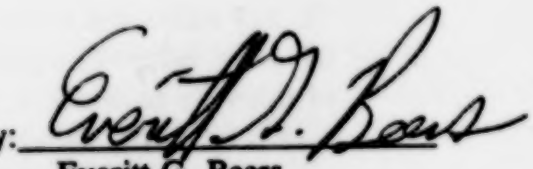
The cases have confirmed that an award of attorneys' fees to the plan sponsor is mandatory. First, *Lads Trucking Co. v. Board of Trustees of Western Conference of Teamsters Pension Trust Fund*, 777 F.2d 1371, 1375-76 (9th Cir. 1985), holds expressly that section 1132(g)(2) mandates an award of attorneys' fees to the prevailing plan. Second, *Woodward Sand Co. v. Western Conference of Teamster Pension Trust Fund*, 789 F.2d 691, 697-98 (9th Cir. 1986), holds that an award of any additional fees incurred by the plan sponsor during the appeal is also mandatory. Third, *Trustees of the Amalgamated Ins. Fund v. Geltman Indus., Inc.*, 784 F.2d 926, 931-32 (9th Cir. 1986), holds that the award is mandatory if the Trust is awarded any part of the withdrawal liability it seeks, even if it loses on some issues. *Geltman* also expressly holds that the mandatory award of fees applies to actions such as the present one to confirm an arbitration award.

Therefore, should the Trust prevail on this appeal, it should be awarded its reasonable attorneys' fees and other court costs on appeal by way of cost bill.

IV. CONCLUSION

The Trust respectfully urges the Court to deny Concrete Pipe's Petition for Writ of Certiorari.

COX, CASTLE & NICHOLSON

By: 
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